No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAL GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLEES' BRIEF.

ALAN ROSS,
139 North Broadway,
Los Angeles 12, California,
Attorney for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Textbooks

No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAL GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLEES' BRIEF.

Preliminary Statement.

Respondent feels compelled at the very outset of this Brief to respectfully draw the Court's attention to the manner in which the Appellant has attempted to retry the issues of this case by resorting to arguments of the evidence and drawing its own inferences of the testimony. Respondents submit that this is not only improper but is a direct attempt to place before this Court unwarranted inferences of the Appellant instead of the actual findings of the Trial Court.

While Appellant frequently resorts to the phrase, "The evidence is undisputed", and "The evidence clearly established", nowhere has Appellant stated that the Trial Court's finding of fact are not supported by the evidence in any respect and Appellant cites no instance of error upon the part of the Trial Court in respect to admission

or rejection of offered evidence, and in this respect Appellant seems to have abandoned his Points 5, 6 and 7 of his statement of Points on appeal.

Appellant's method of argument throughout is to assume the existence of a state of facts favorable to her and to follow these up with elementary statements of law which lead to the conclusion that the Trial Court should have entered judgment in her favor. Inasmuch as Appellant's argument depends on the assumed set of facts contrary to the findings and often in flagrant variance with her own testimony. Respondents in their Brief include a detailed statement of facts with direct reference to the record in each instance.

Comment on the Record.

Appellees are somewhat at a loss to know where to start and stop in pointing out inaccuracies in the so-called "transcript of record." In addition to duplication of pages 78 through 123 on pages 162 through 209 and typographical errors too numerous to mention, some of which appear at transcript page 137, line 7, where word "Bertha" should read "Erwin"; transcript page 147, line 19, where "1953" should read "1935"; transcript page 150, line 14, where "Di" should read "Do"; same error at transcript, page 154, line 8; transcript, page 155, line 5, the words "Not the" are omitted after the word "Present"; transcript, page 165, line 21, the second apostrophe 52 should be apostrophe 53. Transcript page 132, line 24, October 29, 1949, should read October 29, 1948. At page 59, line 10 an entire line of the findings is omitted; after the word "with" and before the word "plaintiff" the following should be inserted "his wife Mattie W. Tatum and after Sept. 3, 1948 Erwin Tatum cohabited with". An important error

changing the testimony in favor of Appellant appears at transcript, page 167, line 7, where "Why do it over" should read "Why do what over". To verify the above, Appellees submit a transcript by J. D. Ambrose, Official Reporter, and his certificate that said transcript submitted herewith is a true and correct transcript of his stenographic notes [Tr. J. D. Ambrose, p. 8].

Nature of the Action.

This action was originally brought by Appellant against the Metropolitan Life Insurance Company, a defendant in the original action, for the proceeds of a policy of life insurance. In her action, Appellant claimed to be the widow of the deceased insured. Metropolitan Life Insurance Company filed its answer and counterclaim for interpleader naming Appellees as defendants in said counterclaim [Tr. pp. 10-23]. Appellees are decedent's children [Tr. p. 59]. The sole issue before the Trial Court and upon appeal is whether Appellant is said widow.

Summary of Material Facts.

A statement of the material and operative facts follows with references to Erwin Tatum, deceased, being made simply as "Erwin"; those to Bertha Tatum as "Bertha"; those to Mattie W. Tatum as "Mattie"; Oscar Tatum is referred to as "Oscar", Val Gene Tatum is referred to as "Val Gene"; and Ruby Fay Johnson is referred to as "Ruby".

On August 29, 1954, Metropolitan Life Insurance Company issued a group policy No. 17000-G providing life insurance for certain Federal employees including one Erwin Tatum. The policy provided that in the absence of a designated beneficiary, the proceeds of said policy should be paid to the employee's widow, and if there was no

widow, to the employee's children. Erwin Tatum did fail to designate a beneficiary and died December 7, 1954. Appellees are the children of Erwin Tatum and Appellant claims to be his widow [Tr. pp. 10-23].

Mattie Tatum, the mother of Respondents Oscar, Ruby Fay and Val Gene, married Erwin Tatum January 1, 1927, at Tyler, Texas [Tr. pp. 133-136; Ex. No. "C"]. Thereafter, Erwin and Mattie resided together continuously in the State of Texas as husband and wife until August, 1935, when they separated [Tr. p. 147]. Respondent Oscar was born to Mattie and Erwin May 15, 1927, at Leon County, Texas [Tr. p. 136]. Ruby Fay was born to them November 3, 1928, in Firestone County, Texas [Tr. p. 136]. Josephine Tatum, a child who has been deceased since 1948, of Mattie and Erwin, was born November 15, 1930 [Tr. p. 137]. Val Gene was born to them July 21, 1932, in Leon County, Texas [Tr. p. 137].

After the separation, both Erwin and Mattie continued to reside in Texas. Erwin provided for the children and no year went by that Mattie did not see Erwin [Tr. p. 148]. In November of 1941 Erwin was inducted into military service from Texas and served until October, 1945 [Tr. p. 140]. Mattie got an allotment as a serviceman's wife [Tr. p. 140].

On May 19, 1943, while still in military service, Erwin and Bertha, Appellant herein, went through a ceremony of marriage at Prescott, Arizona [Tr. p. 128]. Appellant applied for an allotment as wife of a serviceman and was denied same on the ground that she was not Erwin's wife [Tr. p. 204].

Appellant stated in her claim to the Metropolitan Life Insurance Company that she had previously been married to a Sam Wheeler [Tr. p. 186] and that this marriage

was terminated by death [Tr. p. 187]. Her marriage license to Erwin showed that she called herself "Bertha Wheeler" at the time of her ceremony [Tr. p. 194]. At the trial, appellant stated that she was not legally married to Wheeler but was previously married to Abe Baldwin [Tr. p. 187] and that this marriage terminated by divorce [Tr. p. 187]. "So we separated and I went home and so he went some place. I don't know where." Appellant states she never went to court but signed a paper [Tr. pp. 188-189]. Later, upon reopening of trial for taking of further testimony, appellant claimed that the marriage was terminated by death [Tr. p. 240] and after admitting several times that she did not hear about Baldwin's dying "until a couple months ago" [Tr. p. 240] was finally led in to testifying that at the time she married Erwin she believed Baldwin to be dead [Tr. p. 241].

After Erwin's discharge from the Army in 1945, he resided in Los Angeles County until the date of his death [Tr. pp. 4, 190]. Appellant states in her complaint and testified that from the date of her ceremony with Erwin until his death, she believed her ceremonial marriage was a good one [Tr. pp. 4, 191]. She states, in fact, that after that she never had any discussion with Erwin about getting married—"We just figured we were married after getting a divorce and she put him out and he came back and begged my pardon and I took him back" [Tr. pp. 205-206].

In May of 1948, Josephine Tatum died in Texas and Erwin traveled from Los Angeles to Texas for the funeral [Tr. p. 138]. At that time, without any legal proceeding, Erwin left appellant and resumed marital life with Mattie, and together with Mattie, returned to Los Angeles County where they cohabited as husband and wife until September of 1948 [Tr. pp. 138-139].

In May of 1948, appellant had the first of many conversations with Mattie about the relative marital status [Tr. pp. 140, 202]. According to Mattie's testimony, appellant stated she was going to have Erwin sent to the penitentiary for bigamy [Tr. p. 140]. According to appellant, Mattie was the one that told her she was going to have Erwin sent to the penitentiary for bigamy [Tr. p. 202]. In one of the conversations, appellant stated that Erwin

> "was going to come over entirely and stay until he gets his divorce and then come back and *marry her*" [Tr. p. 140].

In September of 1948 Erwin and Mattie separated and Mattie commenced action for divorce in Los Angeles County Superior Court, final judgment therein being rendered November 30, 1949 [Tr. pp. 132-133]. Appellant knew about the divorce, knew when it came up in court and, at that time, knew that Erwin had a previous marriage that had not been terminated [Tr. p. 191]. In September of 1948 Erwin told Mattie that he hadn't gotten a divorce [Tr. p. 141]. On October 7, 1948, Mattie and Erwin executed a property settlement, the signatures thereon being acknowledged before a Notary Public, stating that they were husband and wife [Tr. p. 132]. No other action has ever been commenced between these parties in Los Angeles County [Tr. pp. 141-144; Ex. No. "D"]. In October, 1953, respondent Val Gene was court martialed in Texas and Erwin went there and met Mattie. At that time Erwin told Mattie he wasn't married to Bertha and never would marry her [Tr. pp. 148-149].

After the final decree of divorce between Mattie and Erwin was entered December 30, 1949, appellant testified that during 1950, 1951, 1952, 1953 and 1954, she and Erwin spent three or four weeks in Ft. Worth, Texas

[Tr. p. 165]. While in Texas she had conversations with Erwin as follows:

> "Well, he said . . . when I mentioned about it I says, 'Now is the time for us to fix this and do it over' and he says, 'Why do what over' and he says, 'I am already married to you in the State of Texas.' He said 'I am your husband' and I said, 'Well, if you take it like that it is all right with me. I will take it, too' " [Tr. p. 167, as corrected].

Asked what date appellant decided to get married in Texas, appellant answered:

> " '42 or '43 along in '43, '42 and '44" [Tr. p. 198].

Appellant then answered that after her '43 marriage she agreed to be husband and wife with Erwin and it was in '44 or '45 [Tr. p. 199]. Asked more specifically about the above conversation after calling her attention to it, appellant answered the date of the talk was '51, '52, '53 and '54, and they said the same thing each year [Tr. p. 200]. Appellant further states that she discussed a ceremonial marriage with Erwin in Texas in 1954 [Tr. p. 201], but appellant states that she didn't tell Erwin she wouldn't wear a ring unless she got a ceremonial marriage because "It was never discussed. I thought all the time we were married" [Tr. pp. 202-203]. Again, when questioned if there were any discussions with Erwin about marriage when he left Mattie and came back to live with her, appellant stated:

> "No discussion about getting married. We just figured we were married after getting a divorce and she put him out and he came back and begged my pardon and I took him back" [Tr. p. 206].

While considerable evidence was offered to show that since the ceremonial marriage of May 19, 1943, appellant

and Erwin held themselves out to be husband and wife in Los Angeles [Tr. pp. 167-184] the evidence as testified by appellant is that the only person she knew in Texas was Erwin's mother [Tr. p. 197].

After Erwin's death and before the funeral, respondent Oscar was present at a conversation between appellant and Mrs. Mabel Barnes. Mrs. Barnes asked appellant if she was married to Erwin and appellant stated no. Mrs. Barnes then said: "You should have made him marry you" [Tr. p. 151].

Nowhere in the record does appellant deny this statement. There is, in addition, numerous testimony that Erwin stated at various times that he was not married to appellant [Tr. pp. 148, 151, 157, 233].

Two days after Erwin's death, that is, on December 9, 1954, appellant filled out a claim for death benefits with the Metropolitan Life Insurance Company [Tr. pp. 185-186]. The form stated:

> "I certify that all statements made on this claim are true to the best of my knowledge, information and belief, and that no evidence necessary to a settlement of this claim is suppressed or withheld" [Tr. p. 192].

Appellant listed the date of her marriage to decedent on this form as May 19, 1943 [Tr. p. 191]. Appellant stated her marriage was performed by a clergyman and not otherwise, and made no statement about common law marriage [Tr. pp. 192-193].

Issue Presented.

The issue presented by this appeal is whether Appellant is entitled to the proceeds of a federal employees group life insurance policy on the life of Erwin Tatum, deceased, by virtue of being his widow.

ARGUMENT.

I.

The Finding of the Trial Court That at the Time of Appellant's Marriage Ceremony to the Deceased-Insured Erwin Tatum, There Was a Subsisting Undissolved Marriage Between Erwin and Mattie, Is Amply Supported by the Evidence.

The quantum of proof necessary to rebut the presumption arising in favor of the second of two successive marriages is stated as follows in *Estate of Smith* (1949), 33 Cal. 2d 279, 281, 201 P. 2d 539:

> ". . . the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage . . . That burden is sustained if the evidence in the light of all reasonable inferences therefrom shows that the first marriage was not so dissolved or annulled."

There is no room in the instant case to presume Erwin's first marriage was terminated by the death of his first spouse, Mattie, since she appeared at the trial. At the time of the second marriage Erwin had no right to presume her death since he had seen her every year since the separation and she was not generally reputed to be dead [Tr. p. 148]. In this respect, Erwin told Appellant not that he was a widower but that he was a divorcee. Appellant's belief about Erwin's marital status at the time of the second marriage would be immaterial in this respect.

The record shows that from the time of Erwin's separation from Mattie in August of 1935 until he went into military service, he lived in Texas in the following places only: Leon County, Dallas County, Tarrant County (Ft.

Worth), Limestone County (Mexia) [Tr. pp. 145-147]. After his separation from military service until his death, he resided in Los Angeles County [Tr. p. 4].

Appellees produced the original file of Los Angeles Superior Court D-367319 in the trial court, this file being an action of divorce commenced by Mattie Tatum against Erwin and certified copies of the property settlement therein dated October 7, 1948, the interlocutory judgment entered October 29, 1948, and the final judgment entered November 30, 1949, were admitted as Defendant's Exhibit "A" [Tr. p. 133].

A certificate from Harold J. Ostly, the Clerk of the Los Angeles Superior Court, that a search had been made of all the divorce files with the County and that the above was the only record of any legal action between these parties was received without objection as Defendant's Exhibit "D" [Tr. p. 144].

Certificates from the District Clerks of each of the Texas counties that search for divorce between these parties was made covering a period between January 1, 1935, and December 31, 1944, and that none could be found were admitted as Defendant's Exhibits "E", "F", "G" and "H" [Tr. pp. 145-147]. The same were later stricken on appellant's motion [Tr. pp. 246-247] but were unnecessary to the decision in the face of other evidence.

On October 7, 1948, both Erwin and Mattie appeared before a Notary Public and subscribed acknowledgments in their property settlement. The property settlement stated they were husband and wife and that there was pending in the Superior Court of Los Angeles a suit for divorce [Tr. p. 132-133; Deft. Ex. "A"]. In May of 1948, without any legal proceeding, Erwin left Appellant

and resumed marital relations with his wife Mattie [Tr. pp. 138-139]. While Erwin was in service, appellant attempted to secure an allotment as his wife. She was denied on the ground that she was not the wife [Tr. p. 204]. Mattie received the allotment as the wife of Erwin [Tr. p. 140]. Mattie was never served with any summons or complaint for a divorce proceeding prior to October of 1948 [Tr. p. 144].

All of these events took place long after Erwin's last residence in Texas. Appellant's argument "There is no evidence that Erwin failed to obtain a divorce in the states where he resided between 1927 and 1943" is therefore refuted by Erwin's later actions. In addition to his actions. there is evidence of declarations that Erwin had not terminated his marriage to Mattie [Tr. p. 141]; and there is appellant's testimony that she discussed prosecuting Erwin for bigamy with Mattie [Tr. pp. 140, 202], and that she discussed remarrying Erwin [Tr. p. 167], and appellant's undenied admission to Mrs. Barnes [Tr. p. 151].

In the light of all reasonable inferences, the evidence shows that prior to November of 1949 the first marriage was not dissolved by divorce or annulment. Appellant, however, assumes every fact favoring her claim by the statement, "On the other hand, the evidence clearly established that Erwin obtained a divorce prior to his ceremonial marriage to appellant".

The evidence Appellant refers to is solely Erwin's declaration on an Army form that he was divorced [Tr. pp. 160-161].

Appellant is unfair to the trial court in quoting certain portions of the transcript about burden of proof and pre-

sumption on page 13 of her brief in that said portions are out of context, did not contain a ruling of the court as contended, no offered evidence was rejected and if it were it only would have worked a disadvantage upon Appellees.

Finally, the point is moot because the evidence and the reasonable inferences therefrom heavily preponderate against the presumption.

Appellant's argument that the divorce decree is not *res adjudicata* against her is another example of a straw man she sets up for the purpose of knocking down. Neither appellees nor the court ever contended that it was or that it established anything as a matter of law. It was just one of a long series of actions and declarations of Erwin Tatum and appellant indicating that prior thereto he had never initiated a divorce against Mattie.

Appellant's next point is that the original marriage between Erwin and Mattie in 1927 wasn't valid. While the divorce decree may not be *res adjudicata* as to appellant, it certainly was as to Erwin. The testimony of Mattie that she married Erwin at Tyler, Texas, on January 1, 1927 [Tr. pp. 133, 147], the raising of four children to maturity in one community in Texas, a common law marriage state [Tr. pp. 136-137], the collection of the allotment as Erwin's wife [Tr. pp. 149-150] is entirely sufficient to show the existence of the relationship without the marriage certificate [Tr. p. 136; Ex. "C"].

II.

The Trial Court's Finding That Appellant Did Not Agree to Become the Common Law Wife of the Insured-Decedent Is Amply Supported by the Evidence.

Appellant first predicates her claim as common law wife upon a misstatement of the applicable law. *Ray v. Thompson* (1953), 261 S. W. 2d 251; *Baker v. Mays & Mays* (1947), 199 S. W. 2d 279; and *Hill v. Smith* (1944), 181 S. W. 2d 1051, do not stand for the proposition appellant contends, but instead affirm the statement contained in *Texas Employers v. Soto,* 294 S. W. 639, where the court states concerning common law marriage at page 640:

> "To constitute the marital relation of husband and wife at common law, there must be a mutual consent or agreement expressed or implied between the man and woman to become then and thenceforth husband and wife, and pursuant to such consent or agreement followed by a living together in such agreed relationship. Such consent or agreement without a living together as husband and wife, or a cohabitation or living together without such agreement would not in this State constitute a common law marriage."

Further, where the party offers direct testimony of an agreement, if such testimony fails to sustain a sufficient agreement, neither

> "cohabitation nor declaration, nor reputation, separate nor combined, will prove marriage."
>
> *Schwingle v. Keifer* (1911), Tex. Civ. App. 135 S. W. 194;
>
> *Perales v. Flores* (1941), Tex. Civ. App. 147 S. W. 2d 974.

The court found that appellant did not in the State of Texas agree with Erwin to become husband and wife as a lifelong relationship [Tr. p. 60]. Appellant testified to an alleged conversation in Texas with Erwin which purported to show an express agreement [Tr. pp. 83, 167], but which is insufficient in that it failed to show a meeting of the minds and further showed an acquiesence only in Erwin's misconceptions of the law of marriage. This purported conversation was uncorroborated by any other witness although there was claimed to have been an available witness. Appellant testified that after the divorce she and Erwin just figured they were married, and that there was no discussion about getting married [Tr. p. 206]. In her claim to the insurance company she gave the date of her marriage as that of May 19, 1953 [Tr. p. 191], which was the date of the ceremonial marriage and where the insurance form asked appellant if marriage was ceremonial or otherwise and if otherwise to specify, appellant claimed a ceremonial marriage, failing to specify any other [Tr. pp. 191-193]. Appellant testified that in 1954 she and Erwin discussed having a *ceremonial* marriage in Texas. Further, there was evidence of appellant's admission to Mrs. Barnes that she hadn't married Erwin [Tr. p. 154].

The finding of the trial court with respect to reputation was that at all times after the ceremonial marriage appellant held herself out as married to Erwin. Appellant perverts this into a claim that the evidence showed and that the court found the holding out to be in Texas but there was no community in Texas that knew appellant and Erwin as husband and wife. All the evidence in this respect proved their reputation in Los Angeles, and the only person appellant knew in Texas was Erwin's mother [Tr. p. 197].

Appellant next cites *Estate of McKenna* (1951), 106 Cal. App. 2d 126, 234 P. 2d 673, and *Bobbitt v. Bobbitt* (1920), 223 S. W. 478, which are both distinguishable from the instant case in that the relationships started in Texas and the relationship from its beginning was a lawful one and not meretricious. Further, the *Bobbitt* case does not stand for the proposition appellant claims it does since the case involved evidence of an express agreement by two Texans, a living together in Texas after the agreement for 4½ years, followed by 20 years of living together outside of Texas.

Appellant's argument of domicile is entirely irrelevant since the trial court did not find the relationship lacking by reason of lack of domicile but by reason of lack of agreement.

Appellant next argues that as a matter of law, persons cohabiting become married in Texas when an impediment of a pre-existing marriage of one of them is removed. Not content with overlooking the requirements of agreement express or implied and reputation in the community in Texas where they lived, appellant cites cases which not only do not stand for this proposition but expressly repudiate it. Thus, *Consolidated Underwriters v. Kelly* (1929), 300 S. W. 981, 15 S. W. 2d 229, stands for the proposition that intention of the parties to marry may be shown circumstantially but that a sojourn in a state recognizing common law marriage does not itself convert a meretricious relationship to a lawful marriage. As pointed out in *Hill v. Smith* (1944), 181 S. W. 2d 1015, the circumstantial evidence rule is a practical necessity in Texas since the claiming widow is unable to testify to the agreement directly because of the local "deadman's statute". No doubt appellant has overlooked the fact that the statement

appellant claims the case stands for is specifically disapproved upon its rehearing as follows:

> "We do not approve the statement that a 'sound public policy impels the law to infer consent' under the circumstances found, but do agree that the facts as found authorized an inference of fact as to the matrimonial intent at a time when no legal impediment existed."
>
> *Consolidated Underwriters v. Kelly*, 15 S. W. 2d 229.

On the question of the effect of a sojourn into a state recognizing common law marriage, the *Kelly* case is of interest because of its factual similarity to the instant case. The facts are stated in the opinion, Tex. Civ. App. 300 S. W. 981, affirmed 15 S. W. 2d 229, in the following language:

> "In 1902 Joe Kelley and Louisa Lane, appellant here, negro citizens of Louisiana, living at Amelia, Louisiana began living together and cohabiting as husband and wife, under an agreement that they would be husband and wife, on conditions that in Texas would have constituted a common law marriage. Without ever contracting a ceremonial marriage but living together under the agreement they made their home at Amelia, Louisiana, from 1902 to 1920. During these years Joe Kelley worked about a year in each of the states of Florida, Alabama, Mississippi and Texas. In all of these states it appears that common law marriages are recognized on the same legal principals as in this state. While Joe was working in Florida, Appellant visited him about three months, about two months in Alabama, about two months in Mississippi and about one month in Texas. While visiting Joe he received her as his wife, introduced her to her new

friends as his wife and they lived and cohabited as husband and wife, but their absence from Louisiana was only temporary, and during all these years they maintained their home at Amelia, La., recognizing that their absence from their home was only of a temporary nature, for the purpose of securing employment, and Louisa's visits to Joe were purely in the nature of visits and without any intention whatsoever of acquiring a residence in any of those states.

"Under the statement as made, the laws of Louisiana declared the relationship between Joe and appellant illegal and meretricious and their temporary sojourn in the states recognizing common law marriages did not convert their illegal relations into a lawful marriage."

The California District Court of Appeal summarizes the Texas law on the subject *In re McKanna's Estate,* 106 Cal. App. 2d 126, 234 P. 2d 673, at 677, as follows:

"Where the contract of marriage is invalid under the law in the state in which it is made, the status of the parties thereafter will be regarded as meretricious and that status will follow them during any stay in Texas, unless there is a new agreement of marriage made in Texas followed by cohabitation and a public holding out, or unless they become domiciled in Texas. If the parties become domiciled in Texas, then and in that event, there is no necessity to prove a new agreement of marriage in Texas, but instead consent to a new marriage within that state will be inferred by reason of the original intent to marriage if there be cohabitation in Texas and a public holding out by the parties that they are husband and wife."

In 2 Beale on Conflict of Laws, p. 675, Sec. 123.1, the following statement is made:

> "Parties living together as man and wife in the place where the doctrine of common law marriage does not prevail will not be regarded as thereby married even in a state where the doctrine does prevail.
>
> "If the parties habitually live together in a state which does not thereby create a marriage, they do not become married by temporarily living together in a state where common law marriage is permitted."

To the same effect are the following cases:

In re Binger's Estate, 158 Neb. 444, 63 N. W. 2d 784;

Cruickshank v. Cruickshank, 193 Misc. 366, 82 N. Y. S. 2d 522, 525;

State, ex rel. Smith v. Superior Court, 23 Wash. 2d 357, 161 P. 2d 188, 192.

Likewise, *Curtin v. State* (1950), 155 Tex. Cr. 625, 238 S. W. 2d 187, does not stand for the proposition appellant claims it does. In this case the defense was raised in a criminal prosecution for failure to provide for minor children that the children were not legitimate. By Texas law, children of a putative marriage have a legitimate status. The trial court instructed the jury concerning putative marriage. The Texas court of Criminal Appeals stated that since the putative status ceased when the mother learned of the impediment and all the children were born after this knowledge, putative marriage was not an applicable issue. A second theory of the prosecution was that there was a common law marriage after the removal of the impediment. The court citing *Consolidated Underwriters v. Kelly,* 15 S. W. 2d 229, states that the conduct

of the parties is sufficient "to prove as a matter of *fact* that they intended their relationship to be marital."

The decision rests, therefore, upon an implied in fact contract, not one implied in law by reason of removal of impediment as the appellant contends.

Upon rehearing, the court concluded it had been in error as to a fact and found one of the children was born during the time when the mother did not know of the impediment. Therefore, upon a rehearing, the court concluded that the instruction about putative marriage was proper.

The language quoted by appellant is dicta and refers to part of the instruction which charged a putative marriage may arise out of a common law marriage. This was not in point in this case since the putative marriage here arose out of an invalid ceremonial marriage. The appellant adds to the confusion by not quoting the entire paragraph or even entire sentences and giving this bit of dicta as the holding of the case which it was not.

Appellant's next point is that implied agreement is sufficient and may be found from cohabitation and a holding out to the community. The difficulty with appellant's position is that (1) there was no community recognizing common law marriage to which they held themselves out as married [Tr. p. 197]: (2) the implications from the evidence are contrary to appellant's contention and amply support the findings of the trial court. The relationship was meretricious in its inception and long before appellant went to Texas appellant was aware of that fact [Tr. p. 191]. The only rational inference from appellant's testimony is that the relationship continued the way it started and never changed. The evidence disclosed that neither she nor Erwin ever realized the necessity of an-

other marriage either ceremonial or common law after Erwin had secured his divorce from Mattie.

All the Texas cases examined by this writer are in accord that where the proof shows the original relationship was meretricious, there must be some evidence of a change in the relationship before an inference of common law marriage can arise.

In *Edelstein v. Brown,* 35 Tex. Civ. App. 625, 80 S. W. 1027, at p. 1028, the court makes the following statement:

> "Nor is the presumption of a continuance of the illicit relations affected by a removal of a disability of marriage which existed when the relations began, unless there is a visible change in the manner of living. Where it is sought to show that the illicit relations have changed to legal ones, the burden rests upon the party attempting to show such change."

In *Brown v. Brown,* 115 S. W. 2d 786, the court discusses the problem at page 788 as follows:

> "The relationship being meretricious in its inception, the evidence that it later became lawful would have to be positive and satisfactory, which it is not. Certainly the original agreement, which resulted in the unlawful living together, was not sufficient to transform their adulterous relationship into a lawful one, upon the mere removal of deceased's impediment to marriage when his wife procured a divorce. Even the evidence of this agreement, as we understand it, was testified to by appellant alone."

In *Drummond v. Benson,* 133 S. W. 2d 154, the court makes a similar statement:

> "Where the connection between the parties is shown to have been illicit in its origin, or criminal in its

nature, the law raises from it no presumption of marriage."

Appellant argues that the burden is not upon her to prove an express agreement to become the wife of the deceased-insured Erwin and that she may prove an implied agreement. However, the only reasonable inference that can be drawn from the evidence is the one drawn by the trial court that there was no agreement, either express or implied. There is no question that appellant has the burden of proving the agreement of common law marriage. The general rule is as stated in 55 Corpus Juris, at p. 887 as follows:

> "There is no presumption that persons are married. Accordingly, the burden of proving a marriage rests on the parties who asserted it, particularly where a common law marriage is asserted."

Estate of Gill, 23 Cal. App. 2d 212, 72 P. 2d 771;

Ex parte Morgan, 106 Cal. App. 602, 289 Pac. 647;

King v. King's Unknown Heirs (Tex. Civ. App.), 16 S. W. 2d 160;

In re Estate of Baldwin, 162 Cal. 471, 123 Pac. 267;

Brown v. Brown (Tex. Civ. App.), 115 S. W. 2d 786-788.

The rule as to quantum proof in a claim of common law marriage is stated in the above cases, that in order to establish a common law marriage all the essential elements of such relationship must be shown by clear, consistent and convincing evidence, especially must all the essential elements of such relationship be shown when one of the parties is dead, and such marriage must be proved by a preponderance of the evidence.

III.

The Evidence Amply Supports the Trial Court's Conclusion That Appellant Is Not Entitled to the Status of Putative Wife of the Deceased-Insured Erwin Tatum.

Appellant's claim as putative spouse rests upon an irrelevancy and a misrepresentation.

The irrelevancy is contained in the statement "There is no question but that *at the time of the marriage ceremony* of May 19, 1943 appellant acted in good faith."

Appellant apparently finds it convenient to ignore the evidence of her own testimony that as early as 1944 she knew Erwin had another living wife. When appellant discovered the existence of a prior marriage and knew it to be undissolved, she ceased to occupy the status, if she ever had it, of putative spouse. Thus, in one of the cases cited by Appellant, *Curtin v. State,* 155 Tex. Crim. 625, 238 S. W. 2d 187, the court says:

> "The status of a putative marriage ceased to exist when she learned of the impediment, there being an absence of good faith on the part of both parties thereafter."

Appellant further boldly misrepresents that the evidence clearly established that appellant believed that she was Erwin's wife after the 1943 ceremonial marriage and after Mattie's 1949 divorce. However, appellant's own testimony was as follows:

> "The Court: Just a moment. I want to ask you a question. You knew that Mr. Tatum got a divorce from his first wife, did you not?
>
> The Witness: That was when he was discharged, yes.

The Court: You knew when the case came up in court here in Los Angeles?

The Witness: Yes.

The Court: And you and he were living together at that time as husband and wife?

The Witness: Yes, sir.

The Court: So you did know that he had a previous marriage that had not been terminated at that time?

The Witness: Yes, at that time" [Tr. p. 191].

Having assumed the existence of a set of facts favoring her, but failing to specify in any particular why the findings are not supported by the evidence, appellant fills out her brief with elementary propositions of law about the rights of putative spouses.

If appellant is not entitled to a status of putative spouse, there is little merit in accusing the court of making a distinction between lawful widow as opposed to putative widow which the court, in fact, did not do. On the contrary, lawful widow would be any spouse the law recognizes as the widow and there is nothing in the record to indicate that the court excluded a putative widow from the definition of lawful.

Conclusion.

The findings of the trial court are supported by the evidence. The judgment should be affirmed.

Respectfully submitted,

Alan Ross,

Attorney for Appellees.